CHONG LUN PONG

v.

TONG YOONG FATT & ANOR.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL APPEAL NO. 22-75-89]
24 APRIL 1991

LAND LAW: *Charge - Plaintiff owner of land - Document of title deposited as security for payment of rentals under equipment lease agreement - Default - Memorandum - Allegation of fraud, negligence and conspiracy on part of attorney in relation to creation of charge - Independent legal advice.*

The plaintiff alleged that pursuant to a memorandum, she had agreed to deposit the relevant document of title pertaining to her property, with the 1st defendant her attorney, under the mistaken belief that it was to provide security for two persons, N & H.

She contended that the memorandum was executed without her prior knowledge, that the 1st defendant as her attorney had acted in a conflict of interest situation and that the purported charge had failed to state the amount for which the said land had been charged.

The 1st defendant was also accused of negligence in not informing the plaintiff by prior notice of the creation of the charge.

The memorandum of charge was security for the payment by N & H who were trading under the style of Wan Shoon (M) Sdn. Bhd., of all the rentals and other payments under an equipment lease agreement for a leasing facility.

This was the defendant's application to strike out the plaintiff's statement of claim which sought a declaration that the memorandum of charge was unenforceable.

Held:

[1] The defendants had acted quite properly within the powers conferred by the undisputed memorandum which led to the creation of the charge.

[2] As the plaintiff had executed the memorandum before an advocate and solicitor, she had the benefit of independent and competent legal advice and could not therefore say that she did not know what it was all about or had been misled to sign it for some other purpose.

[3] Further as she had named the 1st defendant and other specified authorised officers of the 2nd defendant to take action on the land charged in case of default by the leases, she could not now say that she was not aware of all these when her Counsel had unequivocally agreed that the memorandum was not in dispute.

[4] As the memorandum of charge was not being disputed and the whole claim rested upon the contents of the said memorandum, the plaintiff's claim must fall under the relevant provisions of the Rules of the High Court 1980.

[Defendants' application granted with costs; plaintiff granted liberty to intervene in the foreclosure proceedings if she had not already done so.]

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)

For the plaintiff - Nga Hock Cheh; M/s. Nga Hock & Co.
For the defendants - Tong N.K. Tan (P. Theyakaraja with him); M/s. N.K. Tan & Rahim

JUDGMENT

Abdul Malek Ahmad J:

This is an application by the defendants filed on 1 June 1990 to strike out the plaintiff's statement of claim filed on 1 March 1989 under O. 18 r. 19(1)(b) & (c) of the Rules of the High Court 1980 on the grounds that it is scandalous, frivolous or vexatious and may prejudice embarrass or delay the fair trial of the action.

It is therefore pertinent to refer to the statement of claim where the plaintiff as registered proprietress of Lot 973 held under Grant No. 13504, Pekan Kampar, Daerah Kinta in the State of Perak (hereinafter "the said land") had agreed to deposit the relevant document of title with the first defendant by a purported memorandum dated 22 October 1986 under the mistaken belief that it was to provide security for Ng Phan Cheong and Hooi Chee Cheong. She went on to allege fraud particularising the facts that it was executed without her prior knowledge, that the first defendant as attorney had acted in a conflict of interest situation and that the purported charge had failed to state the amount for which the said land had been charged.

She had further gone on to allege negligence on the part of the first defendant who as her attorney had failed to inform her or gave her prior notice of the creation of the charge and had acted beyond the powers given by her. She had also alleged conspiracy on the part of the defendants as they had wilfully abstained from taking any prompt action to repossess the equipment and for creating the purported charge without any prior notice to her or to her knowledge. Finally, the plaintiff contended that the equipment lease agreement dated 22 October 1986 was a hire purchase agreement in disguise and was unenforceable on grounds of public policy as it had sought to evade the revenue payable to the Inland Revenue Department.

Accordingly, the plaintiff had prayed for the following:

(a) a declaration that the memorandum of charge is null and void and unenforceable;

(b) an injunction to restrain the first defendant from enforcing the said charge;

(c) an order to stay all proceedings that the first defendant has commenced against the plaintiff in respect of the said charge;

(d) an order that the first defendant execute a discharge of charge relating to the said land or otherwise have it removed from the land register;

(e) alternatively, that the Senior Assistant Registrar be empowered to execute the discharge of charge relating to the said land;

(f) an order that the first defendant return to the plaintiff the issue document of title to the said land;

(g) costs;

(h) further or other relief.

In his arguments, Encik Theyakaraja for the defendants had, quite ably I might add, drawn my attention to the affidavit of the first defendant who is the chief executive of the second defendant to which is annexed the memorandum dated 22 October 1986 between the plaintiff and the second defendant where it is clearly stated at ss. 1.02 and 1.03 that as security for

the payment by Ng Phan Cheong and Hooi Chee Cheong trading under the style of Wan Shoon (M) Sdn. Bhd., of all the rentals and other payments under the equipment lease agreement made on the same date for a leasing facility up to a maximum aggregate of RM131,050, the plaintiff had agreed to deposit the issue document of title of the said land to the second defendant. In that same memorandum, as declared in s. 2.05, the plaintiff had appointed the first defendant and other authorised officers of the second defendant to be her attorney to execute the first legal charge over the said land in the event of any default under the equipment lease agreement.

As there had in fact been a breach of the equipment lease agreement, the plaintiff had executed the charge over the said land as provided under s. 2.02 of the memorandum through the first defendant as stated in s. 2.05 of that memorandum after due notice had been given to the plaintiff. In conclusion, learned Counsel for the defendants had pointed out that the plaintiff had signed the memorandum voluntarily before an advocate and solicitor.

Encik Nga for the plaintiff conceded that the memorandum of deposit was not the issue and he stressed that the plaintiff was only challenging the creation of the charge and that her claim was based on fraud, negligence, conspiracy and public policy on the part of the defendants. However, having considered the arguments of learned Counsel for the defendants and having scrutinised the memorandum, my view was that the defendants had acted quite properly within the powers conferred by the undisputed memorandum which had led to the creation of the charge for which we are now told that action is being taken in the Kuala Lumpur High Court as regards the foreclosure proceedings.

In the process, all the plaintiff's allegations in her statement of claim must surely fall to the ground as having executed the memorandum before an advocate and solicitor, she had the benefit of independent and competent legal advice and could not therefore say that she did not know what it was all about or had been misled to sign it for some other purpose. Further, she had named the first defendant and other specified authorised officers of the second defendant to take action on the land charged in case of default by the lessees Wan Shoon (M) Sdn. Bhd., under the equipment lease agreement made on that same date. In short, how could she now say that she was not aware of all these when her Counsel had unequivocally agreed that the memorandum was not in dispute?

Since the memorandum is not disputed and the whole claim rests upon the contents of the said memorandum, it follows that the plaintiff's claim must fall under the relevant provisions of the Rules of the High Court 1980 under which this application has been made. I had therefore accordingly granted the defendants' application with costs but since the relevant parties in the related Kuala Lumpur foreclosure proceedings had not been identified, I gave the plaintiff the liberty to intervene in that proceedings if she had not already done so or is not a party to those proceedings. In any case, whatever allegations she may have about the charge itself could and would be more appropriately dealt with in that action.

Also found at [1992] 1 CLJ 107